UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA

In re **ST. MARIE DEVELOPMENT CORPORATION OF MONTANA, INC.** Debtor.	Case No. **05-62166-7**

O R D E R

At Butte in said District this 5th day of December, 2005.

Petitioners seeking to place the alleged Debtor St. Marie Development Corporation of Montana, Inc. ("SMDC") in a Chapter 7 bankruptcy, through counsel Ronald R. Arneson, have filed on November 10, 2005, a "Motion for Reconsideration" of the Court's Memorandum of Decision filed October 17, 2005 (DK No. 51) and Final Judgment thereon with award of attorney's fees and costs to SMDC filed November 9, 2005 (DK No. 57). Contrary to Montana Local Bankruptcy Rule ("Mont. LBR") 9013-1(b) and (d)[1], the motion does not specify or cite any Bankruptcy Rule of Procedure or Federal Rule of Civil Procedure under which the petitioners seek relief. These failures alone are grounds to deny the motion. An amended motion was filed on November 23, 205, evidently to cure notice requirements, but it too is deficient.

On November 23, 2005, SMDC filed its response to the motions, asserting the amended

[1]The motions fail to conform with Rule 9013-1(b) and (d) which provide under "Motion Practice" that (b) such motion shall state with particularity the relevant law by section and relevant procedure by Rule upon which the moving party relies and that (d) notice of opportunity to reply shall be set forth as to time to reply in bold and conspicuous print.

motion is untimely as filed outside of the 10 day rule, the motions fail to specify their grounds for relief, the petitioners agreed to the discovery schedule and hearing date, the petitioners did not seek a continuance to conduct further discovery, and are estopped to do so at this late date, and the Court's decision is fully supported by the record of evidence adduced at the hearing. The Court will consider each of these matters in this Memorandum as neither party has requested or scheduled a hearing as required by Mont. LBR Rules 5070-1(b), 5074-1, 9013-1(d) and (e), and Mont. LBF 26.

F.R.B.P. Rule 9023, captioned "New Trials; Amendment of Judgments" incorporates Fed. R. Civ. P. Rule 59. F.R.B.P. Rule 9024, captioned "Relief From Judgment or Order" incorporates Fed. R. Civ. P. 60. *Circuit City Stores, Inc. v. Mantor*, 417 F.3d 1060, 1063 (9th Cir. 2005), discussing a motion for reconsideration under Rule 59(e) or 60(b), citing *American Ironworks & Erector, Inc. v. North Am. Const. Corp.*, 248 F.2d 892, 898-99 (9th Cir. 2001, holds that a motion for reconsideration[2] "is treated as a motion to alter or amend judgment under Federal Rule of Civil Procedure Rule 59(e) if it is filed within ten days of the entry of judgment. Otherwise it is treated as a Rule 60(b) motion for relief from judgment or order." Moreover, reconsideration of a judgment after its entry is an extraordinary remedy which should be used

[2]The Bankruptcy and Federal Rules of Civil Procedure "do not recognize a motion for reconsideration". *In re Captain Blythers*, 311 B.R. 530, 539 (9th Cir. BAP 2004). The petitioning creditors err when they fail to cite authority under which they seek review of this Court's judgment. One court has stated very appropriately that a motion for reconsideration devoid of any relevant statutory or rule authority is a "motion asking for trouble". *In re Smith*, 242 B.R. 694, 698 n.3 (9th Cir. BAP 1999). SMDC points out such deficiency in its response. Moreover, Mont. LBR 9013-1(i) "Motions to Vacate or Amend an Order" provides: "Motions captioned as Motions to Reconsider shall be treated as Motions for Relief from Judgment or Order and should set forth the grounds alleged to satisfy the criteria set forth in F.R.B.P. 9023 or 9024 (or Fed. R. Civ. P. 59 or 60)."

sparingly". Wright, Miller & Kane, FEDERAL PRACTICE and PROCEDURE, Vol. 2D § 2801.1 (1995).

A motion to alter or amend judgment under Rule 59(e) is appropriate "if the district court [trial court]: (1) is presented with newly discovered evidence: (2) committed clear error or the initial decision was manifestly unjust; or (3) if there is an intervening change in controlling law". *Sch. Dist. No. 1J Multnomah County v. ACandS, Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993). Since petitioners' first motion was filed within 10 days of the Judgment, I treat the motion as filed under Rule 9023 and 59(e)[3].

Hagerman v. Yukon Energy Corp., 839 F.2d 407 (8th Cir. 1988) explains:

> Motions for reconsideration serve a limited function: to correct manifest errors of law or fact or to present newly discovered evidence. Such motions cannot in any case be employed as a vehicle to introduce new evidence that could have been adduced during pendency of the summary judgment motion. The non-movant has an affirmative duty to come forward to meet a properly supported motion for summary judgment ... Nor should a motion for reconsideration serve as the

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[3]As noted, petitioners' motion violates local rules of procedure because it is not precise as to which rule they seek to invoke for relief. It is arguable that the motion could be treated under F.R.B.P. 7052, which incorporates Fed. R. Civ. P. 52(b). That rule applies where a litigant believes the court's findings or conclusions of law are erroneous in any respect, and thus seeks to amend or alter them. *Jackson v. United States*, 156 F.3d 230, 234 (7th Cir. 1998). Rule 52 is designed to create a record upon which the appellate court may obtain the necessary understanding of the issues to be determined on appeal. *Clark v. Nix*, 578 F. Supp. 1515, 1516 (S.D. Iowa 1984). But Rule 52(b) is not to be used to obtain a rehearing on the merits nor to relitigate old questions, *see, e.g., Gutierrez v. Ashcroft*, 289 F. Supp.2d 555, 561 (D. N.J. 2003), and such motion may not be used to raise arguments which could have been made in advance of the court's ruling. *Diocese of Winona v. Interstate Fire and Cas. Co.*, 89 F.3d 1386, 1397 (8th Cir. 1996). Most of the arguments by the petitioners here fall within the constrictions of Rule 52(b) and thus do not warrant consideration under that Rule. Indeed, the Court need not make findings on all disputed facts. Rather, the findings should provide a reviewing court a clear understanding of the basis of the trial court's decision and grounds upon which it was reached. *Cross v. Pasley*, 267 F.2d 824, 826 (8th Cir. 1959). I therefore conclude the Court's decision satisfies such tests and decline to employ Rule 52(b). *See, DeGidio v. Pung*, 125 F.R.D. 503, 505 (D. Minn. 1989).

occasion to tender new legal theories for the first time.

In accord, *Capitol Indemnity Corp. V. Russellville Steel Co., Inc.*, 367 F.3d 831, 834 (8th Cir. 2004) (Rule 59(e) motions serve a limited function of correcting "manifest errors of law or fact or to present newly discovered evidence.").

Dewit v. Firstar Corp., 904 F.Supp. 1476, 1494 (D. Iowa 1995) counsels:

> The Eighth Circuit Court of Appeals commented on the "dangers of filing a self-styled 'motion for reconsideration' that is not described by any particular rule of federal civil procedure," and identified the usual bases upon which such motions are construed to have been made, in *Sanders v. Clemco Indus.*, 862 F.2d 161 (8th Cir.1988):
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> > Federal courts have construed this type of motion as arising under either Rule 59(e) (motion to alter or amend the judgment) or Rule 60(b) (relief from judgment for mistake or other reason). *See Spinar v. South Dakota Bd. of Regents*, 796 F.2d 1060, 1062 (8th Cir.1986). The two rules serve different purposes and produce different consequences, both substantive and procedural. *See A.D. Weiss Lithograph Co. v. Illinois Adhesive Prods. Co.*, 705 F.2d 249, 249-50 (7th Cir.1983) (per curiam). When the moving party fails to specify the rule under which it makes a postjudgment motion, that party leaves the characterization of the motion to the court's somewhat unenlightened guess, subject to the hazards of the unsuccessful moving party losing the opportunity to present the merits underlying the motion to an appellate court because of delay.
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> *Sanders*, 862 F.2d at 168
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> The court's "somewhat unenlightened guess" here is that the motion, filed within ten days after the judgment, was intended to be made pursuant to Fed.R.Civ.P. 59(e); *Sanders*, 862 F.2d at 168-69 (distinguishing between of a motion filed within ten days of the judgment, deemed to be made pursuant to Rule 59(e), and one made later, deemed to be made pursuant to Rule 60(b)).

Circuit City Stores, supra, at 1063, also discusses the above notable differences between Rule 59(e) and 60(b).

At trial, parties are required to raise all issues and facts so the court does not face piecemeal litigation. If legal theories and facts are not raised at the trial stage, it is untimely to assert them on motion for reconsideration particularly where the evidence and theories could and should have been timely presented. As stated in *Great Hawaiian Financial Corp. v. Aui*, 116 F.R.C. 621 (D. Hawaii 1987):

> A litigant should not be permitted to assert its argument seriatim, especially after losing a summary judgment.
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> A motion for reconsideration is an improper vehicle to tender new legal theories not raised in opposition to summary judgment.

The same teaching applies to the pending motion for reconsideration. In the request for relief the petitioners ask this Court (1), "reconsider its previous Order dated November 9, 2005, and grant the petition and place St. Marie Development Corporation in Chapter 7 Bankruptcy"; (2) . . . "that the Court award Petitioners their costs, attorneys fees and appropriate punitive damages to be paid by Mr. Kelly, Mr. Davick and Mr. Johnson", and (3) "As an alternative, . . . suggest that the court appoint an interim Trustee and that this Trustee will schedule a special meeting of the shareholders of the St. Marie Development corporation as soon as possible for the purpose of electing a legitimate Board of Directors. The Trustee could then review with this Board the conditions of the corporation and submit a recommendation to the Court for further consideration." The last two requests cite no legal basis for relief, were never presented at trial, and on their face are without factual or legal basis and thus are summarily denied.

Petitioners' motion alleges the following premises for apparent relief under Rule 59(e):

> "A. Petitioners were not provided the opportunity to depose several of the debtor's witnesses. Kevin Davick. The only witness petitioners were able to depose refused to provide critical information requested in the notice of

deposition."

The Notice of Deposition of Davick is not in the record, nor did the petitioners submit the Davick deposition with their motion. Moreover, if petitioners' counsel desired to take other depositions of SMDC witnesses listed for trial, counsel had the right to timely seek a continuance of the hearing for that purpose, which was not done! F.R.B.P. Rule 1018 – "Contested Involuntary Petitions – Applicability of Rules in Part VII Governing Adversary Proceedings" – provides that discovery rules 7024-7026, 7028-7037 apply to contested involuntary chapter 7 cases. Accordingly, discovery was available to the petitioners as a matter of right under Rule 7030, incorporating Fed. R. Civ. P. Rule 30. As a strategic matter, where a party wants discovery by deposition, it is too late to wait until after the trial to complain that the party was denied discovery, particularly when that party proceeded to trial, as did SMDC, without any compliance with Civil Rule 26 mandatory disclosure requirements. This Court has the discretion to shorten times and continue hearings to permit discovery where appropriate discovery has been timely requested. Here, petitioners had the SMDC witness list 4 days before trial and did nothing to seek pre-trial discovery. *See, e.g., Khachikyan v. Hahn*, __ B.R. __ (9th Cir. BAP 11/02/05).

Further, as to the alleged failure of Davick to provide certain, unspecified financial information, petitioner's counsel had the right to seek relief under F.R.B.P. Rule 7037 (Fed. R. Civ. P. Rule 37) "Failure to Make or Cooperate in Discovery: Sanctions". Counsel did not do so, never presented the matter to the Court at trial, and this created their own dilemma. Indeed the reconsideration request is devoid of any specific financial data which petitioners now untimely assert was sought and not provided. The Court notes that under Rule 1013(a), "the court shall determine the issues of a contested petition at the earliest practical time . . . ." *Matter of Wynn*,

899 F.2d 644, 646 (5th Cir. 1989), quoting *Matter of B.O. Intern. Disc.*, 15 B.R. 735, 759 (Bankr. S.D. N.Y. 1981) holds Rule 1013(a) is designed for speedy resolution of an involuntary petition to benefit both creditor's relief and debtor's protection. Counsel for petitioner at the hearing made no objection to proceeding with the matter and cannot complain at this late date. This specification is without merit.

> "B. Debtor through its Agents and/or Representative grossly misrepresented many key points in their efforts to demonstrate bad faith on behalf of petitioners."

The petitioners' motion recites an alleged factual matter dealing with North Valley County Condominium Association, harking back to past bankruptcy petitions, some of which are in the record and some is new evidence readily available to petitioners before trial.

The matter of additional petitioners added to the case was addressed by this Court's decision. The matter regarding Glacier Trail Management Services was also addressed by the decision from the evidence in the record; as was the matter of foreclosure of the hospital and golf course projects, together with the terms of the mortgages. The ownership of condominium units by Edson is in the record, all of which is now before the Montana state district court. Thus, the specification is merely a rehash of the record, with an attempt to turn the facts more favorable to the petitioners. The specification is without merit and any matter presented after the trial is too late.

> "C. Individuals appearing on behalf of the Debtor St. Marie Development Corporation of Montana (SMDC) do not have the authority to represent SMDC."

This argument dwells on the corporate existence of SMDC, which is new and was not represented at trial. As noted by SMDC, president Davick was deposed and his authority to appear on behalf of SMDC was never questioned. The argument is also contrary to the

involuntary bankruptcy petition filed in this case which throughout this proceeding admits the corporate existence of SMDC. The motion on this specification consists of a rambling, unsupported rehash of irrelevant and inconsistent newly alleged facts which are disputed by SMDC. For the first time, the petitioners make unsupported allegations that the Board of Directors members in 2004 were Kelly, Davick and Carlstrom, that the Bylaws provide for 12 members, and no annual meeting was called in 2005, among other details – all of which were readily available before trial. Indeed, Exhibit 29 presented by petitioners witness Bethea includes as Exhibits 2, 3, and 4 minutes of the Board of Directors of 2002, and 2003 to show its corporate existence. Docket #1 "Involuntary Petition" filed July 1, 2005, states the names of the alleged Debtor as SMDC, with registered agent Carlstrom, a corporation, domiciled, with a place of business in this District for 180 days immediately preceding the petition and that the "debtor is a person against whom an order for relief may be entered under title 11 of the United States Code"! The evidence shows the present Board of Directors consists of Davick, Kelly, Carlstrom, Johnson, Gardner, Hansock and Hallock – which evidentially satisfied SMDC's corporate existence. To now challenge that existence is a red herring and a blatant disregard of the involuntary petition.

In sum, all of the allegations in the Motion are either already established in the record, are irrelevant to the issue of bad faith of the petitioners, contrary to their position at trial and a rehash of irrelevant matters. I must restate that the issue of bad faith involved the petitioning creditors, not SMDC or its representatives.

The Court has therefore considered all of the allegations set forth in the motion of the petitioners, treated as a Rule 59(e) motion, and finds nothing which constitutes "newly

discovered" relevant evidence, unavailable at trial, but is a rehash of factual arguments rejected by the Court, which do not in any respect change the findings of fact and conclusions of law set forth in the Court's Memorandum of decision and Judgment. Finally, the motion cited not one legal authority which points to a manifest error of law, or intervening change in controlling law, or that the Court committed clear error or the initial decision was manifestly unjust.

Accordingly, for all the above reasons,

IT IS THEREFORE ORDERED the Petitioners' Motion for Reconsideration filed on November 10, 2005, as amended on November 23, 2005, is denied.

BY THE COURT

HON. JOHN L. PETERSON
United States Bankruptcy Judge
District of Montana